if it effectually makes the masters and crews of tugs servants of the ship which is being towed — servants for the time being — then it will follow that the owner of the tow cannot claim for damage brought about by people who for the time being are his own servants; and he must also be liable for damage caused to the authority's property by persons who for the time being are his servants, the servants of the owners of the tow.

I have considered Mr. Batten's criticism. I think that clause does do what it sets out to do; and I think it sets out in terms that for all purposes connected with the towage the masters and crews of tugs are the servants of the owners of the tow. I do not think that can be limited in the way Mr. Batten suggests. I think it provides that for the purposes of the towage and for all purposes connected with the towage they are the servants of the owners of the tow. That, I think, is enough to show that for any negligence of those in charge of the *Sirdar* — the master and crew of the *Sirdar* — the owners of the *President Van Buren* are liable to the authority, that is to say, for any damage to the *Sirdar*, and cannot themselves claim in respect of any damage done to the *President Van Buren*."

Mr. Lloyd for the defendants on the other hand contends that this case is distinguishable in that the towage contract contained a specific undertaking by the owners of the tow to pay for any damage caused to the Port Authority's tug and that the above quoted passage is only *obiter*. I am unable to accept Mr. Lloyd's contention and I agree with Mr. Smith that the *President Van Buren, supra*, is a direct authority in his favour. In my view the first section of our towage contract effectually provides that whilst carrying out towage service the master and crew of the tug are the servants of the masters of the tow. As the collision occurred through the negligence of the helmsman of the *Pitho* whilst the *Pitho* was carrying out towage service, the defendants as owners of the *Takashima Maru* are vicariously liable to the plaintiff for the negligence of their temporary servants.

The plaintiff is accordingly entitled to damages for the loss of the *Pitho*, such damages to be assessed by the Registrar, with the assistance of Assessors if necessary, and to costs. The defendants must also pay the fees of the Assessor who assisted me which I fix at $150 per day.

Order accordingly.

Solicitors: *Donaldson & Burkinshaw; Drew & Napier.*

PALANIAPPA CHETTIAR v. S. SOLAI

[O.C.J. (Ong J.) May 15, 1961]

[K.L. — Probate No. 80 of 1958]

Probate and Administration — Grant of Letters of Administration to non-resident — Validity — Failure to disclose previous grant to third person — Administrator next-of-kin of deceased — Application for revocation — Applicant interested as alleged beneficiary of property — Probate and Administration Ordinance, 1959, ss.29, 30.

Practice and Procedure — R.S.C., 1957, O.52 — Whether to proceed by motion or action.

The respondent, who was resident in Singapore, obtained letters of administration to the estate of his grandfather which consisted of a piece of land. The respondent failed to disclose to the Court that a grant to the same property had been made to one Annamalai who was the attorney of one Kasi, alleged to be one of the beneficial owners of the property. Some time later Kasi died. The applicant, as administrator of another of the alleged beneficial owners of the property applied for an order that the grant of letters of administration made to the respondent be revoked.

Held: (1) section 29(c) of the Probate and Administration Ordinance, 1959, does not operate to disqualify and disable absolutely any non-resident from obtaining a grant of letters of administration if he is otherwise a fit and proper person and circumstances render it expedient that the grant should be made to him;

(2) the respondent's failure to disclose to the Court the previous grant of letters of administration made to Annamalai was not of such culpable character as to amount to sufficient cause for revocation;

(3) on the death of Kasi the power of attorney granted to Annamalai was automatically revoked and it was therefore not necessary that the void grant should have been formally revoked;

(4) in any event, the applicant was not competent to apply for the revocation, he having no interest, until he proved that the property was trust property.

Cases referred to:—

(1) *Re Sevugan Chettiar* [1949] M.L.J. 255.
(2) *Re Dinshaw* [1930] P. 180.
(3) *Suwerkop* v. *Day* 112 E.R. 975.
(4) *Re Syed Abdullah* [1939] M.L.J. 179.
(5) *Re Murugappa Chettiar* [1940] M.L.J. 178.

MOTION.

W. H. Sault for the applicant.
R. Ramani for the respondent.

Cur. Adv. Vult.

Ong J.: This is a motion by the applicant for an order that the grant of letters of administration to the estate of Supramanian deceased made by this Court on February 20, 1960 to the respondent be revoked, and that the respondent's petition for letters of administration and all proceedings subsequent thereto be set aside.

The deceased Supramanian, died in India intestate as long ago as December 9, 1912. The estate consists of a half-share in Kuala Lumpur Grant for Land No. 578 and Certificate of Title No. 1485 valued then for purposes of estate duty at $7,100. Its present value is in six figures.

The history of this property, so far as it is relevant to the conflicting claims of the parties herein, goes back about 60 years. I do not think any useful purpose can be served by going into such history at all, much less since each party has put forward his own version, and no decision is called for as to the merits in the present proceedings. For convenience I propose to refer to the applicant hereinafter as Palaniappa and to the respondent as Solai.

The property was registered in the name of Supramanian, some time before his death, as proprietor of a half-share. I shall refer to it hereinafter as "the property." Solai is the only grandson of Supramanian and on April 2, 1958 he filed his petition for a grant of letters of administration to the property as such grandson and next-of-kin. He duly filed also the written consent of the other surviving next-of-kin, who are his father and aunt.

Palaniappa claims that the property is trust property held by Supramanian in trust for the three former partners of a money-lending firm known as "P.M.S." of which Supramanian was for some time the manager. Palaniappa is a son of one of the partners, Lakshmanan, and administrator of his father's estate. That partner-

ship was dissolved about 50 years ago, and subsequently disputes over title to property led to prolonged and complicated litigation between those partners or their representatives, and the representatives of Supramanian, the end of which I understand is not yet in sight. Such litigation, however, never involved the property, the subject matter of the present proceedings, and its beneficial ownership appeared to have remained undisputed for over forty years.

An apparently innocent inquiry, however, by the Public Trustee in September 1952 as to property left behind in Malaya by Supramanian for which no one had bothered to take out a grant of letters of administration led to a scramble.

On July 20, 1953 one Annamalai, attorney of Kasi (alleged to be one of the beneficial owners of the trust property) was granted, as such attorney, letters of administration to the estate of Supramanian, limited to what was described as "trust property" in Petition No. 68/25.

In March 1955 Solai sought to have such grant revoked, but on September 23, 1955 Wilson J. dismissed his application on the ground that he should have proceeded by way of suit in a contentious probate matter. Other proceedings thereafter ensued at the instance of one party or the other, all of which proved abortive, and, in the meantime Kasi died, whereby certain legal consequences followed affecting the grant to his attorney Annamalai as attorney.

On April 7, 1958 Solai filed a fresh petition for letters of administration in Petition 80/58. Palaniappa entered a caveat on June 2, 1958. The caveat was warned by Solai on June 24, 1958 and the warning was served on Palaniappa on July 2, 1958.

Palaniappa was advised by his solicitors — whether rightly or wrongly is of no consequence in the present proceedings — and he chose to refrain from entering an appearance. On January 13, 1960, Solai's solicitors took out a certificate of non-appearance. On February 20, 1960 Mr. Ramani appeared before me in Chambers, and no contentious proceedings having arisen by default of an appearance on the part of Palaniappa I made an order that the grant of letters of administration do issue to Solai.

Palaniappa now moves for its revocation, basing his application on three main grounds: (a) that Solai is not resident within the jurisdiction of this Court and has no lawful attorney to act for him in the Federation of Malaya, nor had he given any address for service within the jurisdiction; (b) that Solai had failed to make full disclosure to the Court regarding the grant of letters of administration made on July 20, 1953 to Annamalai, which grant still remained unrevoked when the grant was made to Solai on February 20, 1960; and, (c) that in any event Solai is not a person lawfully entitled to the grant as he is not one of the beneficiaries of Supramanian deceased, and his claim is only through his father, Vaisu Shanmugam, an undischarged bankrupt, whose estate is vested in the Official Receiver of Madurai, South India.

Mr. Ramani, counsel for Solai, arguing *contra*, contended that Palaniappa should have proceeded by way of action, instead of by motion, since under Order 52 of our Rules of the Supreme Court, there is no omnibus provision which extends to applications by motion to revoke a grant of letters of administration and the matter cannot possibly be decided on affidavits when there is serious controversy on complicated questions of fact extending over a half-century of time. I refrain from expressing any opinion on this point because it is not necessary for me to do so. But, without going so far as to hold that, because the procedure is wrong, the Court ought not and will not on that ground proceed to dispose of the matter, I would, nevertheless, say that, while an application for revocation of a grant of probate or letters of administration may in simple cases not be objectionable if made by motion, when there exists serious controversy as to facts, or the case is otherwise of a very complex character requiring inquiry into factual allegations, discovery, hearing of witnesses and consideration of documentary evidence. an action ought to be instituted because it is eminently the best way of dealing with all matters in dispute.

Briefly, Mr. Ramani's other arguments are that the order of February 20, 1960 was in the circumstances properly made; that Palaniappa and others who claim a beneficial interest in the property are complete strangers to the estate of Supramanian, deceased, and consequently unable to say that they have a better right to a grant than Solai himself; that these claimants under an alleged trust may now bring an action forthwith against Solai as administrator to establish that the property was trust property; and that, in any event. there is no sufficient cause for revocation as land within the jurisdiction cannot be dealt with by Solai as administrator without leave of the Court, and, moreover, a caveat has already been lodged against any dealings therewith by him.

I am much obliged to both learned Counsel for their assistance in presenting a *precis* in digestible form of the obscure history and background of the case, thus sparing me a considerable proportion of the wearisome lucubration which I should have had to undergo in the perusal of files extending over scores of years. I hope, however, that I shall not be considered discourteous if I do not discuss all their arguments in detail but proceed along other lines more briefly to dispose of the matter.

To start with, I think the practical approach is in the best interests of all parties concerned. It is necessary to bear certain salient facts in mind. First, the property is land to which the Torrens system of registration of titles applies, and the registered proprietor is *prima facie* the beneficial as well as legal owner.

Secondly, an administrator cannot deal with immovable property within the jurisdiction except by leave of the Court. Thirdly, the conflicting claims to beneficial ownership await a decision of the Court on the merits at some future date. Fourthly, no impediment now stands in the way of the interested parties proceeding to seek such adjudication forthwith.

I am aware that the parties are jockeying for positions of advantage before pitting their strength against each other. In my opinion the question of tactical onus is more imaginary than real, but at this stage that is all I need say on the point.

Mr. Sault's submission, in effect, is that in granting letters of administration to a person not resident within the jurisdiction, otherwise than to his attorney, the Court had acted not only contrary to the provisions of the Probate and Administration Ordinance, but without any jurisdiction; *à fortiori,* as Solai has no such interest in Supramanian's estate as to come within the class of persons entitled to a grant of letters of administration.

The main question therefore is whether the order of February 20, 1960 was invalid or so erroneous that it ought to be set aside and the grant revoked.

It is clear that Solai was resident in Singapore when he filed his petition and that he is still there resident. Mr. Sault's contention is that a non-resident cannot himself apply, but only by attorney, and that the disqualification or disability is implicit in the provisions of the Probate and Administration Ordinance, 1959, and of the former Enactment which it has replaced.

Section 43 of the former Enactment is as follows:

"When a person entitled to administration in case of intestacy is absent from the Federation and no person equally entitled is willing to act, letters of administration may be granted to the attorney of the absent person limited as above-mentioned."

It has now been replaced by section 29(c) of the Ordinance of 1959 which reads:

"29. Where a person who would be entitled to representation is absent from the Federation, the following provisions shall apply —

(c) where a person entitled to letters of administration in case of intestacy is absent from the Federation, and no person equally entitled is willing to act, letters of administration may be granted to an authorised attorney of such absent person, limited until he shall obtain a grant himself."

Section 29(c), however, should be read in the light of section 30, namely —

"30. In granting administration the Court shall have regard to the rights of all persons interested in the estate of the deceased person or in the proceeds of sale thereof, and, in particular, administration with the will annexed may be granted to a devisee or legatee; and in regard to land settled previously to the death of the deceased, and not by his will, administration may be granted to the trustees of the settlement; and any such administration may be limited in any way the Court thinks fit:

Provided that, where the deceased died wholly intestate as to his estate, administration shall, if application is made for the purpose, be granted to some one or more of the persons interested in the residuary estate of the deceased, unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person."

Section 30, in my opinion, confers on the Court a wide discretion which is additional to its power under section 29(c) of granting letters of administration to the attorney of an absent person. While the word "may" in paragraph (c) is clearly directory, I do not think it should be given such mandatory effect as to fetter the Court's discretion under section 30. In *re Estate of O.RM.M.S.M. Sevugan Chettiar deceased,* [1] Willan C.J. was of opinion that section 41 of the former Probate and Administration Enactment — which corresponded to section 29(a) of our present Ordinance, and provided that letters of administration with the will annexed "may be granted" to the attorney of an absent executor — was "merely an enabling provision: it does not provide that where an executor is absent from the country, administration of the deceased's estate can be granted only to an attorney of the absent executor." In my view a similar construction should be put on section 29(c). I accordingly hold that the provision in section 29(c) does not operate to disqualify and disable absolutely any non-resident from obtaining a grant of letters of administration if he is otherwise a fit and proper person and circumstances render it expedient that the grant should be made to him. Nowhere in the Ordinance do I find any express prohibition of the appointment of a non-resident as administrator: and in the absence of statutory prohibition, I do not think it is contrary to principle to do so in a proper case. In other jurisdictions, as for instance, in the United States, the position is set out in Vol. 33 of the American *Restatement,* the *Corpus Juris Secundum,* at page 948; as follows:

"Non-residents are eligible to administer an intestate's estate unless made ineligible by statute, although the courts in the exercise of discretionary power may decline to appoint a non-resident. .....

In the absence of statutory prohibition the Court may appoint a non-resident as administrator of a decedent's estate, or may appoint the nominee of non-residents. .....

Even where non-residence is not expressly made a disqualification it is a matter to be considered in determining the propriety of the appointment; non-residence is ground for the exercise of discretion as to appointment of an administrator, and as a general rule in the absence of special circumstances a non-resident should not be appointed so long as any other distributee competent to act and willing to assume the trust is within the jurisdiction of the Court."

The true legal position of non-residents as set out above in the Restatement does not appear to be any different from that under our law.

Coming to the facts, there are on the record the written consents of Solai's father and of his aunt to the appointment of Solai himself, thus clearing off all others having a better title to the appointment. Although our writ does not run to Singapore, I cannot close my eye to the fact

that Solai is resident, and has for some years past been resident, only a few miles beyond the jurisdiction of the Court — not separated by oceans or continents. Nor can I be oblivious of the common practice of administrators coming into the Federation from India on a visitor's permit and leaving these shores no sooner had they extracted their grant of probate or letters of administration. No doubt such persons can, before their departure, appoint a delegate under the provisions of section 27 of the Trustee Ordinance, 1949, to perform the functions of their office, but they are under no obligation to do so, in which case, should they leave no attorney resident within the jurisdiction, any proceedings against them must involve recourse to the provisions of Order 11, R.S.C., for service out of the jurisdiction. The essential factor to be borne in mind in granting letters of administration in these cases is to ensure that the Court retains proper control over the assets of the estate, and such control the Court retains in the fullest measure over immovable property. Therefore, in all the circumstances of this case there appears to be every reason for and none against the appointment of Solai as administrator. The Court had jurisdiction to make the order; it was regularly made, after Palaniappa had failed to enter an appearance, and I do not find any good cause shown for revoking the grant to Solai.

In any event, I do not think that Palaniappa is competent to apply for the revocation. He can claim an interest in the property only if it is trust property; unless and until that fact is proved, it seems to me that I cannot act on any hypothesis which places him on the footing of a true beneficiary. No stranger to the estate can be heard in an application for revocation and it clearly remains to be proved that Palaniappa is not in fact a stranger.

In coming to my decision against revoking the grant to Solai I would add that I have not overlooked the second ground of complaint mentioned by Mr. Sault, namely, Solai's failure to disclose to the Court the grant of letters of administration made to Annamalai on July 20, 1953. In Solai's petition of April 2, 1958 reference to Annamalai was made in the following manner:

"7. That to the best of petitioner's belief application was fraudulently made to the High Court at Kuala Lumpur on 20.7.1953 by A.P.L. Annamalai Chettiar for a grant of letters of administration of the same estate."

It omitted certain particulars, namely, that Annamalai's application was made under Petition for Letters of Administration No. 68 of 1925, that the grant had been duly made in that petition, and that the death of Kasi after the grant had rendered it void or inoperative.

The result of such omission is that in respect of the same estate a grant of letters of administration had been made in two separate petitions. Mr. Sault's contention, as I understand it, is that, on the death of Kasi, the principal, the grant to his attorney Annamalai merely became inoperative, but even so, his grant ought to have been recalled and revoked, otherwise there would be two concurrent grants in respect of the same property. Mr. Sault cited *In re Dinshaw*, [2] but, with respect, I do not think that the case is any authority applicable to the instant case. I have also been referred by Mr. Ramani to *Suwerkop* v. *Day*, [3] *In the Estate of Syed Abdullah*, [4] and *In re the Estate of Murugappa Chettiar deceased*. [5] In the last two of them *In re Dinshaw* had been considered by Manning J. and Gordon-Smith J. in their respective judgments, but in both cases the facts are greatly different from those here. The law on the point, however, is to my mind quite clear. The death of the grantor of a power of attorney automatically revokes such power. A grant of letters of administration to an attorney limited in the usual terms cannot but lose all force and effect on the death of the attorney's principal. Indeed the grant in terms provides for its own avoidance. Hence I do not think it necessary before a new grant is made that the void grant should have to be formally revoked. *Suwerkop* v. *Day* is authority for this view, if any is required.

Solai's non-disclosure of the particulars in this case is not in my view of such culpable character as to amount to sufficient cause for revocation of his grant. It was not obtained by subterfuge, by stealth or by secrecy. Any mistake or irregularity as there was did not and could not in the circumstances have been misleading to the Court and I should have made the order as I did on February 20, 1960, had all the particulars omitted from the petition been fully set out.

The application is accordingly dismissed with costs.

Application dismissed.

Solicitors: *W. H. Sault; Braddell & Ramani.*

BANK OF CHINA v. LEE KEE PIN

[O.C.J. (Rigby J.) May 18, 1961]

[Penang — Originating Summons No. 358 of 1960]

Mortgage — Deposit of title deeds — Sale of land by mortgagee — Lease by mortgagor — Conveyancing and Law of Property Ordinance (Cap. 118), s.23 — Variation of conditions of sale.

The plaintiffs obtained judgment against the defendant for the recovery of $520,654.99 being moneys lent to and paid on behalf of the defendant together with the interest and bank charges due and payable thereon. No payment having been made by the defendant, the plaintiffs applied for and obtained an order for the sale of the defendant's property secured to them by way of deposit of title deeds, with vacant possession but, however, subject to "the existing right of any third party if any." The conditions of sale had been sent to the defendant and on the day before the sale took place the defendant insisted that the property be sold subject to a lease which he had granted to a third party for two years with an option to the lessee to renew for a